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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable James Donato, Judge

TELESOCIAL, INC.,)	
)	
Plaintiff,)	
)	
VS.)	NO. C 14-03985 JD
)	
ORANGE, S.A., et al.,)	
)	
Defendant.)	
)	

San Francisco, California
Friday, March 24, 2017

TRANSCRIPT OF PROCEEDINGS

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1 Friday - March 24, 2017

10:25 a.m.

2 P R O C E E D I N G S

3 ---000---

4 **THE CLERK:** Please be seated. Calling Civil 14-3985,
5 Telesocial, Inc., versus Orange S.A. Will the parties please
6 state their appearances for the court?

7 **MR. BRIGGS:** Good morning, Your Honor, Todd Briggs
8 from Quinn Emanuel for the plaintiff, Telesocial. Also with me
9 is Amy Candido.

10 **MS. CANDIDO:** Good morning, Your Honor.

11 **MR. BRIGGS:** David Myre?

12 **THE COURT:** Who was that? Amy Candido? Okay.

13 **MR. BRIGGS:** And Maissa Chouraki. And Ms. Chouraki
14 is a second-year lawyer who you may hear from today if we --

15 **THE COURT:** Okay.

16 **MR. BRIGGS:** -- argue jury instructions.

17 **THE COURT:** All right.

18 **MR. BRIGGS:** And also with me is our co-counsel from
19 the firm of Singer Bea, Ben Singer.

20 **MR. SINGER:** Good morning, Your Honor.

21 **MR. BRIGGS:** And Renee Bea.

22 **THE COURT:** All right.

23 **MS. DURIE:** Good morning, Your Honor. Daralyn Durie,
24 from Durie Tangri, representing Orange. With me is my
25 colleague, Eugene Novikov, also from Durie Tangri; and

1 Mr. Schimmel and Anthony Mirenda from Foley Hoag.

2 **THE COURT:** I didn't catch that last part.

3 **MS. DURIE:** Daniel Schimmel and Anthony Mirenda.

4 **THE COURT:** Yes. Great. All right. Okay. Well,
5 let's see. So you've all been with Judge Tigar. Is that
6 right? Why don't you come on up?

7 **MR. BRIGGS:** Yes, Your Honor. We met with
8 Judge Tigar on Monday. We made some progress, and we're
9 continuing to talk and continuing to work with Judge Tigar. I
10 think he was going to be out of town next week, but he planned
11 to communicate with us when he was on his trip.

12 **THE COURT:** Okay. Do you have anything set up to see
13 him again, or is it more open?

14 **MR. BRIGGS:** It's more open-ended than that. We
15 don't have another meeting scheduled. The only date he had
16 available on his calendar was March 20th, before trial.

17 **MR. MIRENDA:** He did ask the parties to get in touch
18 with him after today's proceedings, this afternoon, or Monday,
19 to let him know the progress.

20 **THE COURT:** Okay.

21 **MR. MIRENDA:** And perhaps have further discussions.

22 **THE COURT:** All right. Good. Well, I'm glad that
23 worked out.

24 Sorry. Just turning my calendar on. Just one second.

25 Okay. All right. So here are --

1 This part, you can sit down. Here are the general
2 dynamics. So we're going to have you in on April 3rd at
3 9:00 a.m. And I do four days a week: Monday, Tuesday,
4 Wednesday, Thursday. Fridays are dark. Okay?

5 And the trial day is 9:00 a.m. to 2:30 p.m. There will be
6 two -- there's no lunch. There are two 15- to 20-minute
7 breaks; one in the morning, and one in the early afternoon. So
8 that lets -- I do that because, you know, this is a big
9 commitment by the jurors as well as by the litigants; by the
10 jurors particularly. It's important that they get out early
11 enough not to get hung up in traffic; come in late enough to
12 get kids off to school and do other thing before we start.

13 So you've all asked for --

14 By the way, the pretrial filings were, for the most part,
15 in very good shape. So thank you for that. You have the
16 distinction of being the first sides who both actually followed
17 my order on motions *in limine*, and did only evidentiary issues.
18 And I'm grateful for that. No covert summary judgment.

19 So in addition to that, I've decided to give you 16 hours
20 of trial time each. All right? So that's your examination
21 time: All objections, everything else, other than opening and
22 closing. You'll have up to 45 minutes for opening each, and up
23 to an hour for closing each.

24 Now, with my schedule of Monday through Thursday, that
25 should be about seven and a half, maybe eight -- or probably

1 seven and a half trial days. Okay? So that will be two weeks
2 of actual calendar time before it goes to the jury. So you
3 should plan on that. And I will tell the jury that when they
4 arrive.

5 I do need, before I forget, a very short two- or
6 three-sentence joint description of the case. I share that
7 with the venire panel when they come in, so they know what's
8 happening. So make sure you get that to me -- unless I say
9 otherwise, just assume everything that we talk about today
10 should be due by 5:00 p.m. on Tuesday of next week. Okay?
11 Now, if that's a problem, you can discuss it with me, but it
12 will help me keep things in order just to set that as a
13 deadline. So get that to me by 5:00 p.m. -- just a very short
14 statement which I can read to the venire panel.

15 I'm going to seat nine jurors. And what I do is a strike
16 and replace method. So we'll call in, you know, somewhere
17 between 40 and 50 people; probably more towards 40. This is
18 not the kind of case where people are going to have a lot of
19 conflicts with, unlike other cases we do. I will seat nine in
20 the box. They're all randomly called. All right?

21 Now, I do the *voir dire*. It's going to be based on my
22 standard demographic questions and the questions that you all
23 have submitted that I need to give. And I'll have that out
24 Monday or Tuesday of next week. And, you know, if you want to
25 object to anything or supplement, you'll have a chance to do

1 that, but that will be the *voir dire*.

2 Now, I will have each person in the box -- all nine
3 jurors -- speak out loud, so you will hear them and you will
4 see them. They will have a hand mic, and they will answer the
5 eight -- we have about eight basic demographic questions.
6 Where do you live? Relationship status. Employment history.
7 Education background. Military service. Prior jury service.
8 The usual eight questions that are asked of everybody. They'll
9 pass the mic around. You can see them and hear them, as I
10 mentioned. Then I will ask the *voir dire* that we especially
11 agree to.

12 Now, when I ask the nine in the box, I am also going to
13 ask the same questions of all the people in the venire panel --
14 Okay? -- because I don't want to have to repeat it. It's too
15 time-consuming to do it. Now, the people in the audience are
16 going to have a notepad and a pen. And I'm going to give them
17 the question number -- you know Question Number 4, for example.
18 Have you ever been involved in a trade-secret litigation? I'm
19 just making that up. Okay?

20 Everyone here will respond by raising his or her hand.
21 And if there's follow-up, we'll handle it; but everyone in the
22 audience is going to make a note, saying, *When I get called up,*
23 *if that happens, I will tell the Judge I haven't answered*
24 *Number 4.* It makes things go much more quickly. All right.
25 So we'll go through all of that.

1 And you'll have your peremptories, as accorded by statute.
2 I think the statutory number will be fine. And you can --
3 we'll have a sidebar at that point. And you can dismiss anyone
4 that you want, under your peremptories, or raise a cause
5 challenge, if you need to do that.

6 Now, when I excuse someone who is in the box, that seat
7 will be filled in the same order as that person was excused.
8 So, for example, if it's Juror Number 7 who was excused, one
9 person will come up and fill Juror Number 7's seat. All right?

10 Now, there are two thing you need to keep in mind. If we
11 do a round of challenge and you do not challenge someone
12 sitting in the box, that person is a juror. You cannot go back
13 later and say, *We want to actually raise a challenge to*
14 *Number 1.* If you pass on someone, that person is seated.
15 There's no backhoe-ing. Okay? So that's the first point.

16 Second point is, as I said, you can -- I'm going to fill
17 each seat. So once people are seated, and pass, that seat is
18 taken. You're not shuffling people around. All right?

19 So any questions so far on that?

20 **MR. BRIGGS:** No.

21 **MR. MIRENDA:** Your Honor.

22 **THE COURT:** Jury selection typically take about 90
23 minutes.

24 Sorry. Go ahead.

25 **MR. MIRENDA:** Just the one question. I thought

1 Your Honor -- maybe I misheard. Your Honor said April 3rd. I
2 thought it was -- April 10th was the opening first day of
3 trial.

4 **MR. BRIGGS:** That's correct. I heard the same thing.

5 **THE COURT:** It's when?

6 **MR. BRIGGS:** I said I heard the same thing. I heard
7 "April 3rd," too.

8 **THE COURT:** Oh, it's April 10th. Who set for
9 April 3rd?

10 **THE CLERK:** Nobody, but you have something on the
11 4th.

12 **THE COURT:** Oh, okay. All right. That's someone
13 else's trial. Okay. So all of that still applies, but I will
14 see you on April 10th. Is that right? Okay.

15 **MR. BRIGGS:** Can I ask for one clarification,
16 Your Honor? Did you say 15 hours or 16 hours?

17 **THE COURT:** Sixteen.

18 (Discussion off the record.)

19 **THE COURT:** That was user error. I was looking at
20 another Judge's calendar. So we are all set. And I was
21 concerned, because it said, "Judge out the week of April 10th,"
22 and I don't remember going anywhere. Okay. All right.

23 Any other questions on jury selection? No?

24 All right. So be prepared to open on that Monday. And
25 you always -- whoever -- plaintiffs, starting with you, you

1 need to have your witnesses next in order ready to go. Okay?
2 If anyone does not have -- I don't want to burn jury time.
3 We're not going to end a half hour early or 45 minutes early or
4 even 15 minutes if someone's not available. This is a precious
5 time, a precious resource; and we're going to make every effort
6 to be efficient and optimal in its use. So you must have your
7 next-in-order witness on deck and ready to go. If you don't,
8 you're going to be deemed to have rested. Your case-in-chief
9 will be over. Okay? So between letting witnesses burn time in
10 the hallway and wasting jury time, it's going to be on the
11 witnesses. All right? Be aware of that, and make sure you
12 have your folks ready to go.

13 Now, I do let jurors ask questions. We'll have a written
14 form. Before I dismiss each witness, I will ask the jury if
15 they have any questions. I've had about 15 trials to date, and
16 in almost all of those, questions have been asked -- not in
17 criminal cases, but in civil cases -- and they have uniformly
18 been outstanding questions. So I encourage that, and I'm
19 looking forward to doing that. We will have a brief discussion
20 before I decide whether to ask a question or not. I think on
21 only one occasion or two occasions have I declined a question,
22 but I will talk about it first, and then I will pose the
23 question to the witness before the witness is discharged.

24 The jurors are also going to be allowed to take notes.
25 And one of the things you two are going to do is prepare a jury

1 notebook this size. One-inch binder. Okay? And you're going
2 to put on a caption sheet that's very plain. It just says the
3 name of the case, and then "Juror Notebook," in about this
4 size; you know, about 15-, 16-point font at the bottom. Bring
5 in 12 of those, just so we have a few extras. This will be on
6 the first day of trial. It should have three tabs in it.

7 Behind the first tab, put in 50 -- five zero -- pages of
8 lined, ruled paper; kind of thing you may have used at some
9 point in your school life, but make sure it's three-hole
10 punched, and it's in the binder, and it's lined. That's going
11 to be their notepaper.

12 Behind the second tab we're going to put in headshots;
13 eight-and-a-half-by-eleven headshots of each witness before
14 they testify. So you may -- you need to set this up. It's
15 very easy to do. When you call a witness, as that witness is
16 being seated, you're going to give Ms. Clark the photograph, in
17 color. It must depict the witness in exactly the same
18 appearance and clothes as of the day of testimony, with the
19 witness' name at the bottom. All right? That's to help the
20 jury keep track of who said what when. It's a very effective
21 tool for the jury to remember testimony. As they're being
22 seated, Ms. Clark will hand out the color headshot of the
23 witness, and they'll put that behind Tab 2. Okay?

24 Behind Tab 3, each juror at the end of the case is going
25 to get a copy of the Final Instructions, to read along with me.

1 It's too hard to listen to these things. They need to have
2 that. And one copy in the jury room is not enough. So each
3 juror is will have a full set of your Final Instructions, to
4 follow along as I read them out.

5 Now, if is there any need -- I don't think there is, but
6 do you all want to have any kind of glossary or anything to
7 hand out?

8 **MR. BRIGGS:** No.

9 **THE COURT:** If you want to, you can change your mind.
10 I mean, I'll do it only if it's a joint, agreed definition.
11 I'm not going to resolve any disputes, but if both sides want
12 to put in a couple of acronyms, that's fine.

13 Oh, also by Tuesday I need a list of all of the witnesses
14 or potential witnesses, so I can read their names during *voir*
15 *dire* to the jury.

16 Okay. Any questions on that?

17 **MR. MIRENDA:** Your Honor, again, that Tuesday -- is
18 that next Tuesday, or is it the Tuesday --

19 **THE COURT:** Next Tuesday. I want to get it. I'd
20 like to get all of these things done. Is that too soon? You
21 want it to be next Thursday? How about next Thursday?

22 **MR. MIRENDA:** It's fine. Whatever.

23 **THE COURT:** Everything for Thursday at 5:00 p.m.

24 **MR. MIRENDA:** All right. Thank you.

25 **THE COURT:** Much more time. As you know, this is a

1 fully electronic courtroom. All of the evidence will be
2 displayed on screens. You don't have to pass anything out.
3 And you, in fact, shouldn't pass anything out, unless there's
4 some special reason for it. Okay? So the jurors all have
5 monitors. I have monitors. The public's going to have
6 monitors. So make sure you're all fired up for that. You can
7 make an appointment with Ms. Clark a couple days before trial.
8 Have your tech teams come in. It's very easy. Microsoft
9 plug-and-play display. Have your teams come in; get it wired;
10 make sure you're ready to go, so that nobody's fumbling around
11 during trial time.

12 Now, the only hard copies you should give are to me and to
13 the witness. All right? So have a witness binder, just in
14 case the monitors aren't working very well; sometimes that
15 happens on the witness stand. So you can examine a witness,
16 get your exhibits. Make sure there's a hard copy on that desk,
17 and one for me. It's much easier for me to look at documents
18 in print for objections than it is on screen. So each day --

19 What I don't want is I don't want 30 binders of all of the
20 potential evidence. I just want each day -- you come in. You
21 have four witnesses. At the start of each witness, you hand
22 Ms. Clark that binder with docs that you may or may not use;
23 but whatever the potential universe of exhibits is, so I will
24 have it here. Okay? I will probably return those to you at
25 the end of each day; maybe not. But just do it witness by

1 witness; and not a giant, you know,
2 Encyclopaedia Britannica-size kind of thing, a reference that
3 makes sense only to the people over age 50. Don't give me a
4 huge compendium. All right? Any questions on that?

5 No sidebars during trial. Don't ask. There will be no
6 sidebars. If we have an issue, we can raise it before the
7 day's testimony or at the end of the day.

8 If you have an objection, stand up, so I can see it. I
9 can't hear it, because I'm often looking at the witness or
10 looking at the screen or something. Stand up and just say,
11 "Objection. Hearsay." Just one word. Okay? Or three words,
12 if you need to. "Facts not in evidence." Whatever you want to
13 say -- but that's it. Okay?

14 All right. I think that's all of the preliminaries.

15 Oh. Also, for evidence that goes to the jury room, once
16 things are admitted, what I like to do is we have a dedicated
17 laptop that we put in the jury room. So all of the evidence at
18 the end of the case, you're going to put on a USB stick. Okay?
19 And that's going to be given to the jury, so they don't have to
20 shuffle through documents. It's fully searchable. It's
21 actually very handy for the jury to have. There's a laptop in
22 the jury room. It is completely severed from any external
23 access. It has no internet or anything else. It can be used
24 only to display the documents that are on the memory stick. So
25 at the end of the trial, make sure your team gets together with

1 Ms. Clark, and you all can get that put together.

2 All right. That's the basics. Anything else? Any
3 questions? No? None?

4 Okay. Oh, and then the final thing is -- and Mr. Briggs?

5 **MR. BRIGGS:** Yes.

6 **THE COURT:** Mr. Briggs alluded to this. Look. We
7 have a very urgent need for younger lawyers to have court time.
8 So I want both sides to do everything you can do to get your
9 younger attorneys up and examining a witness or, you know,
10 handling the defense of a witness, or doing something. Okay?
11 This is the time to do it. These types of trials don't happen
12 very often, so I would be grateful -- and I know your younger
13 colleagues would be grateful -- if you'd make a real effort to
14 get some of your less-experienced people some courtroom time.
15 Okay? Can you do that, Mr. Briggs?

16 **MR. BRIGGS:** Absolutely.

17 **THE COURT:** Ms. Durie.

18 **MS. DURIE:** Yes, sir.

19 **THE COURT:** All right. Good. Okay. Now let's do
20 the motions *in limine*. All right. Here are your motions *in*
21 *limine* rulings.

22 Orange's Motion Number 1 -- let me just get that. All
23 right. That motion is denied. Trade secrets is an intentional
24 tort. And the Business Plan -- I mean, the Facebook
25 Demonstration is relevant to issues of intent and motive.

1 However, there will be no reference to the Nondisclosure
2 Agreement or the breach of the Nondisclosure Agreement. So,
3 Telesocial, you can show that document from Facebook with
4 respect to whether that is something the jury might want to
5 consider for motive and intent, but no discussion of the NDA or
6 the breach of the NDA. All right?

7 There's no Orange Number 2. Right?

8 **MR. MIRENDA:** That's correct, Your Honor.

9 **THE COURT:** So Orange Number 3. That's denied,
10 without prejudice, pending proof at trial. I need to see some
11 thing before I can fully resolve this. I do want to see
12 evidence that links the --

13 Is it LeDrogo? Is that how you say it?

14 **MR. MIRENDA:** LeDrogo. Yes, Your Honor.

15 **THE COURT:** All right. I want to see evidence at
16 Telesocial that the LeDrogo Business Plan came out in some
17 close proximity in time to the misappropriation of the trade
18 secrets. If that -- and you all have a little bit of dispute
19 about that timing. If that timing is close enough, I will let
20 it in.

21 My other concern is I do not want the jury to be confused
22 or misled about that Business Plan with respect to potential
23 damages.

24 Now, the plan and the projections in it, you know, might
25 be relevant to a royalty theory; but it is not going to be

1 argued -- and we'll get to more about this when we get to
2 Mr. Foster -- Dr. Foster. It is not going to be allowed to be
3 evidence of the valuation of plaintiff's trade secrets or
4 technology, or the valuation of any benefits to Orange.

5 And the reason for that is those projections are
6 completely speculative. They were never realized in fact. And
7 they're not a reasonable basis for a jury to decide actual
8 losses for plaintiff, or actual profits or gains for
9 defendants.

10 So if you all cross the threshold of showing on a
11 reasonable basis that the LeDrogo plan came out in close
12 proximity to the misappropriation, I will let it in.

13 I will also be open, if someone wants to request it, to a
14 limitings instruction, to make sure that the jury gets why it's
15 coming in, and we can help preempt any confusion about damages.

16 All right. So I think that's the only two from Orange.
17 Is that right?

18 **MR. MIRENDA:** That's correct, Your Honor.

19 **THE COURT:** Okay. Now, Telesocial. The Telesocial
20 Number 1 -- that is granted in part. Stillerman can testify.
21 However, he cannot, as I've said before, express any legal
22 opinions or conclusions that is not an appropriate role for a
23 testifying witness.

24 Telesocial Number 2 is granted on 402/403 grounds.
25 There's significant risk that jury would just kind of be

1 mystified by what's going on. And it would be a significant
2 diversion of time to get through the truth of those issues.
3 And I think that's of doubtful relevance. So it's excluded on
4 402/403 grounds.

5 Telesocial Number 4 is granted in part. Any reference to
6 the lawsuit or litigation is excluded on 403/403 grounds.

7 However, if Mr. Tucker wants to come in and testify about why
8 he invested, and how much he paid, and what he got in terms of
9 ownership stake, that's perfectly fine. So he can do that in
10 person, but there will be no discussion of any subsequent
11 litigation, breach of duties, or anything else that Mr. Tucker
12 alleged.

13 There was no opposition to the exclusion of the
14 \$11 million to \$13 million purchase price figure, and so that
15 number is excluded on that ground.

16 Telesocial Number 5 is granted. Patents -- I'm going to
17 set the rule, because I can't figure out evidentiarily where
18 you are, but the rule is going to be: If you did not disclose
19 the patents in discovery, they're not coming in now. You can't
20 do that. You can only -- Telesocial's request was broad and
21 perfectly reasonable. So if the patent was not disclosed in
22 the course of discovery, it cannot be raised at this point.

23 **MR. MIRENDA:** Your Honor, the patent was disclosed.
24 I think that was the point of our opposition, was that that
25 patent was disclosed and discussed extensively. It was, in

1 fact, produced 14 times -- the patent, itself. And it was
2 discussed during the expert depositions. So --

3 **THE COURT:** Well, I thought it wasn't disclosed in
4 response to the interrogatory. Is that right?

5 **MR. MIRENDA:** It was outside the scope -- this
6 particular patent was outside of the scope of the
7 interrogatory.

8 The interrogatory was asking for social calling patents,
9 which, of course, related to Facebook; patents related to
10 technology used involving social networks.

11 The social networks didn't exist back in 2001 when this
12 patent issue.

13 **THE COURT:** Let me ask you this. What are you
14 planning to do with these patents?

15 **MR. MIRENDA:** The only reason this patent is
16 relevant, Your Honor, is because there is a particular feature
17 disclosed in the patent is the click-to-call technology.

18 **THE COURT:** Okay.

19 **MR. MIRENDA:** One aspect of what the plaintiff claims
20 as a trade secret is click-to-call. And so we want to be able
21 to demonstrate that click-to-call was a publicly known feature;
22 that that's --

23 **THE COURT:** As of what? Was it 2001?

24 **MR. MIRENDA:** Yeah, 2001. Click-to-call has been
25 around for many, many years. The plaintiffs have it as part of

1 their -- one of the trade secrets. That's why it was
2 discussed. Mr. Gray acknowledged during his deposition that if
3 something had been disclosed in a patent, it would not be a
4 trade secret. So that's the relevance of this. And --

5 **THE COURT:** All right. So let me just jump in.
6 Where do you say that you think it came up? So it was not in
7 the interrogatories, but where did it come up?

8 **MR. MIRENDA:** It was produced as a document in
9 discovery. It was disclosed in response to a different
10 interrogatory that asked generally about Orange's history. The
11 fact that Orange had a click-to-call patent was disclosed in
12 response to a different interrogatory.

13 **THE COURT:** Which interrogatory was that?

14 **MR. MIRENDA:** That was Interrogatory Number 5, which
15 said that since 2000, Orange had worked on projects involving
16 the ability to call individuals without knowing their phone
17 numbers. And they'd owned patents in that area. The patent,
18 itself, was produced in discovery.

19 And then it was the subject of inquiry at Mr. Telesocial's
20 expert, Mr. Gray's, deposition. He was shown the patent. He
21 was asked questions about the fact that if something had been
22 disclosed in a patent, it would, by definition, not be secret.
23 And he agreed with -- you know, obviously, agreed with that
24 proposition.

25 So that's the only purpose for it.

1 **THE COURT:** All right I may have misapprehended that
2 record. I thought it had not been disclosed at all. Is that
3 right, Mr. Briggs?

4 **MR. BRIGGS:** They did disclose it, Your Honor --
5 that's correct -- but not in response to this interrogatory.

6 And this interrogatory's very clear. It asks Orange to
7 identify all patents related to social calling.

8 And now the way they want to use it -- Mr. Mirenda just
9 said this. He wants to use it to show that one of our social
10 calling trade secrets had some feature that was in the -- in
11 the prior art. So they are now taking the position that this
12 patent is related to social calling, but it was never in the
13 interrogatory response.

14 **THE COURT:** Well, you had it. You had the patent.
15 Correct?

16 **MR. BRIGGS:** We did have the patent.

17 **THE COURT:** And you had deposition testimony about
18 the patent?

19 **MR. BRIGGS:** There was some deposition testimony, but
20 they -- but they never took the position --

21 **THE COURT:** You weren't sandbagged by not having it.
22 You had it.

23 Now, whether they classified it in the right interrogatory
24 response is a very different issue from never having disclosed
25 it, and then springing it out on you after discovery's passed.

1 So I'm going to -- I may flip on this, but I'll just look
2 at this again. I mean, I'm going to look at this again, but if
3 it turns out that I'm satisfied that it was disclosed, maybe in
4 a different interrogatory, but in an interrogatory, and was the
5 subject of deposition testimony, and in plaintiff's possession,
6 I'm probably not going to grant that motion. I had
7 misunderstood the record. I thought it had not been disclosed
8 at all. A little slip-up under the wrong interrogatory number
9 is not enough. I mean, you have it.

10 Look. This is a very practical issue. Did you have the
11 data and the evidence, or didn't you? If you didn't, you win,
12 because you got sandbagged, and we're not going to let that
13 happen. If you did have it, but it got to you in a way that
14 was not specifically in the path that you think is best, you
15 still had it in hand. You're going to lose. Okay? All right.
16 I'll take another look at that.

17 And Telesocial Number 6. Discovery one. You know, it's
18 granted in part, but the rule's going to be what I just
19 articulated. If a technical antecedent or some other project
20 was disclosed in discovery, then it's fine. It can come in.
21 If it wasn't, it's not going to come in. Okay? I can't tell.
22 It's too hard for me to tell on these exhibits who did what
23 when, so we'll have to let the evidence unfold at trial; but if
24 it turns out that somebody starts talking about something that
25 is news to Telesocial, then it's not going to be allowed in.

1 **MR. BRIGGS:** Yeah. And can I clarify the purpose of
2 this motion *in limine*?

3 **THE COURT:** Sure.

4 **MR. BRIGGS:** We asked a very specific interrogatory
5 asking Orange how they developed the Party Call product.

6 **THE COURT:** Yes.

7 **MR. BRIGGS:** Which is the product that we claim has
8 been -- misappropriated Telesocial's trade secrets.

9 **THE COURT:** Right.

10 **MR. BRIGGS:** And they gave us a response. And they
11 indicated in that response that the product was derived from a
12 product called "Viadeo," in part. They didn't mention any
13 other products, at all.

14 And so what we -- what the purpose of this motion *in*
15 *limine* is, is we just want to prevent them from coming to
16 trial, and then having their witnesses say that they derived
17 Party Call from all of these other products that they've thrown
18 out during the course --

19 **THE COURT:** I'm agreeing with you. That's my order.
20 It wasn't disclosed.

21 **MR. BRIGGS:** Okay. Thank you, Your Honor.

22 **THE COURT:** Now let me be clear. If it wasn't
23 disclosed in Interrogatory 8 --

24 (Reporter requests clarification.)

25 **THE COURT:** It's not in interrogatory 8, but it is

1 disclosed in Interrogatory 15 -- I'm making numbers up --
2 you're not going to take that position. I'm not going to hold
3 that position. All right?

4 If you had it and you knew about it -- I don't care what
5 the conduit is -- it's going to be fair to raise at trial. But
6 if it did not come up, then it will not be allowed in evidence.
7 All right? The evidentiary bar is for one purpose, alone. And
8 that is to prevent people from being ambushed. You can't say
9 you're ambushed when you had the stuff in hand, even though it
10 didn't come to you in exactly the way you asked for it. If you
11 have it in hand, you have it in hand. And we're not advancing
12 on the head of formatting pins to try to exclude evidence. All
13 right? So that will be the rule.

14 Now, if this comes up, you just need to make a brief
15 comment to me, and I will resolve it out of presence of the
16 jury. Now, you need to be prepared to show me exactly what it
17 was that was not disclosed, or what was disclosed. All right?
18 Don't just tell me this happened. You need to show me a
19 document or deposition testimony or something else that I can
20 look at and have an evidentiary basis, other than argument, to
21 make the decision. Okay?

22 All right. So I think that's it for the motions *in*
23 *limine*. Is that right? Any other ones out there? No?

24 All right. Let's do the jury instructions. I'm just
25 going to do the disputed ones today, and then we're going to

1 work on getting a final set.

2 Now, what I do also is -- as every other trial judge does,
3 I do a preliminary set at the beginning. And I'm going to ask
4 you to put that together for me by the end of week, as well.
5 We'll get to that, but that's just the introductory things.
6 What is evidence? Burden of proof. You know, some of the
7 basics. None of the legal things. We'll do that a little bit
8 later.

9 In the meantime, here are the disputed jury instructions.

10 Disputed Instruction Number 3. I'm not going to give
11 that. I don't think it's necessary, and I don't think it's --
12 it's not involved with the rules, so that is out.

13 Instruction Number 24.

14 By the way, if I miss any of the disputed ones, just let
15 me know.

16 So 24 and 28, which we'll get to in a moment.

17 You know, I -- so -- Orange, your only objection to
18 Telesocial's version of 24 is the lack of the Terms of Use
19 language. Is that right?

20 **MR. MIRENDA:** That's correct, Your Honor.

21 **THE COURT:** Okay. Now, Mr. Briggs, I just -- I'm
22 having a little trouble understanding where you're going to go
23 with the Terms of Use.

24 **MR. MYRE:** Your Honor. Your Honor, if I may --

25 **THE COURT:** Yes, of course.

1 **MR. MYRE:** David Myre.

2 **THE COURT:** Yep.

3 **MR. MYRE:** I think the problem with --

4 **THE COURT:** Come up, up, up.

5 **MR. MYRE:** Okay. Thank you.

6 I think we heard your Terms of Use ruling loud and clear
7 last -- two weeks ago, but the problem that we have with the
8 proposal that they've made for their jury instruction is
9 they've basically taken a ruling in *Facebook* that was fact
10 specific, and made it a general rule. And the statement that
11 they've --

12 **THE COURT:** There's a -- I need more clarity, first,
13 on what you all are going to do with this Terms of Use
14 agreement. I mean --

15 **MR. MYRE:** Your Honor, I don't -- it's not our
16 intention to say that just because they breached the Terms of
17 Use, that is enough to get it over the line of a CFAA, or the
18 California --

19 **THE COURT:** I'm being imprecise.

20 What is the alleged breach? How did they breach the --
21 what is your theory about how they breached the Terms of Use?

22 **MR. MYRE:** Sure. So there's a couple different
23 provisions in there.

24 One was about reverse engineering portions of the
25 Telesocial API.

1 **THE COURT:** Right.

2 **MR. MYRE:** And then using that to essentially
3 unfairly compete with Telesocial. And that's a second
4 provision in there that says, *Don't use our API to*
5 *reverse-engineer it and compete with us.* So those are the
6 general bases for the breach claim.

7 **THE COURT:** All right. That is -- I had suspected
8 that was going to be your answer. I'm glad you confirmed that.

9 There's just no way that those breaches are going to
10 amount to a CFAA violation.

11 **MR. MYRE:** I understand that. I understand that,
12 Your Honor.

13 **THE COURT:** They just can't.

14 **MR. MYRE:** But I think that they're -- and the case
15 that we cite is *Oracle* on this point. And what that case says
16 is that when you look at the course of conduct that a company
17 engaged in -- and one of those things is they explicitly
18 breached the Terms of Use, and another one of those things is
19 they, you know, went behind -- I think in that case, it's that
20 they downloaded things illegally; and they also tried to
21 basically cover their tracks when breaking into the system.

22 And what the Court said is, *When you look at that as a*
23 *whole, that can be sufficient to say -- to be essentially*
24 *exceeding authorized access.*

25 **THE COURT:** No. I'm with you on that, but -- so --

1 **MR. MYRE:** And so the reason --

2 **THE COURT:** -- the two things you've outlined are not
3 going to be, in and of themselves, the basis for a CFAA or
4 California state law breach claim --

5 **MR. MYRE:** Agreed, Your Honor.

6 **THE COURT:** -- or access claim --

7 **MR. MYRE:** Agreed.

8 **THE COURT:** -- or hacking claim. I'm telegraphing.
9 You understand what I'm saying. Okay.

10 So with that in mind, I have a proposal. So I think the
11 defendants' language is overbroad, and doesn't track
12 Ninth Circuit precedent -- particularly *Facebook* -- accurately,
13 so I'm not going to use that language, but here is my proposal.
14 We'll use Telesocial's version of 24. And we will add
15 somewhere in there this language. *In this case, if defendants*
16 *were authorized to access a computer, they did not exceeded*
17 *their authorization simply because they used the information on*
18 *the computer in a way that was not authorized by the Terms of*
19 *Use for Telesocial's API.*

20 Okay? I think that's fair. So I think that addresses the
21 defendants' concern. You know, if you breached the ToU, you
22 don't want to necessarily have the jury immediately assume that
23 you were hacking, which is a fair point.

24 **MR. MIRENDA:** Absolutely, Your Honor.

25 **THE COURT:** And plaintiffs agree. Is that right?

1 **MR. MYRE:** Sorry. What was the question again?

2 **THE COURT:** If they simply breached the ToU --

3 **MR. MYRE:** It would not be a violation of the CFAA.

4 I agree with that.

5 **THE COURT:** I do think it's fair to advise the jury,
6 so I think that language does it. All right?

7 So I'm going to have an amended set of these come out,
8 which you're going to help me with. I will put that language
9 in there, and you can reflect on it, and give me some feedback
10 a little bit later.

11 **MR. MYRE:** Sounds good.

12 **THE COURT:** I think that's the appropriate way of
13 resolving that.

14 Now, with respect to the state-law analog, I think it's --
15 they're not the same claim. They are two different bodies of
16 law. *Nosel* (phonetic) and *Facebook* do not construe the
17 California state statute. Nevertheless, I do think, just for
18 consistency and to avoid any kind of a jury slip-up, we should
19 use the same Terms of Use language in both locations. Okay?
20 Any objection to that?

21 **MR. MIRENDA:** No objection, Your Honor.

22 **MR. MYRE:** No objection.

23 **THE COURT:** Okay. So that's what we will do on that
24 issue. Now, for Number 28, which is the intent to defraud, I'm
25 going to stick with the Model Instruction. The good-faith

1 issue is, I think, already baked into the idea of intent, so
2 you can certainly argue that; but I'm not going to supplement
3 the Model Instruction with that.

4 Jury Instruction Number 33 -- that's the one that we will
5 add the -- that's the California Data Access and Fraud Act.
6 We'll add the Terms of Use language to that.

7 Let's see. Now, getting to the breach-of-contract claim,
8 Number 47, I am not going to give Number 47. That's the one
9 offered by the defendants. I think it's unnecessary and
10 potentially confusing.

11 But for the damages portion, I am -- this is -- disputed
12 Instruction 51, starting with Telesocial's version. You know,
13 the special damages under the CACI need to be put into evidence
14 and defined by the Judge before we offer that to the jury. So
15 I'm not -- I'm not going to spell out here exactly what it is
16 the jury should consider until I hear the proof at trial. And
17 then we're going to give a very precise list of the special
18 damages that there is an evidentiary basis for the jury to
19 consider. So that's going to be a little bit of the
20 placeholder instruction, but I'm not going to give the version
21 that is currently proposed by Telesocial. It will be subject
22 to that revision as we get through trial.

23 And then there's a second version of 51 on lost profits
24 specifically, and that one I'm just not getting. How? What
25 are the conceivable lost profits in breach of the ToU?

1 **MS. CANDIDO:** Your Honor, I believe the potential
2 lost profits --

3 **THE COURT:** I mean, you know if you're selling
4 things, I get it; but these are Terms of Use. And I just -- I
5 can't see what lost profit is traceable to the breach of a
6 Terms of Use agreement. Any thoughts?

7 **MS. CANDIDO:** We have thoughts, Your Honor. And --

8 **THE COURT:** Instruction withdrawn?

9 **MS. CANDIDO:** I think we would actually like to
10 reserve this for proof at trial.

11 **THE COURT:** No. That's not going to work. You need
12 to tell me now why it should be good. I don't see any legal or
13 evidentiary theory, whatsoever, that would allow lost profits
14 to be attributed to the breach of the API Terms of Use. Tell
15 me why I'm wrong. Take a moment. Go ahead.

16 (Discussion off the record.)

17 **MS. BEA:** Your Honor, I'm going to see if I can help
18 address this issue.

19 **THE COURT:** All right.

20 **MS. BEA:** Renee Bea.

21 In part, the Terms of Use have provisions that instruct
22 that a user cannot misuse the API or reverse-engineer the API.
23 When we are talking about a software product that is put out on
24 the market, one of the last lines of defense for a software
25 company is this kind of a provision.

1 And, in fact, Terms of Use in the marketplace are used to
2 protect against these kinds of anticompetitive actions. And so
3 it's conceivable -- and what we will introduce evidence of at
4 trial is that, in conducting these violations of the Terms of
5 Use, which certainly dovetail with other claims and other
6 conduct that will be presented at trial, if you take the
7 software product, reverse-engineer it, and market it out to the
8 world as your own, you deprive the software company of its
9 opportunity to profit off of its own product.

10 **THE COURT:** But I thought Orange's product was Party
11 Call.

12 **MR. MIRENDA:** Yes, Your Honor.

13 **THE COURT:** I thought they didn't sell a single one.
14 Did you sell that to anybody?

15 **MR. MIRENDA:** No, Your Honor. Never launched.

16 **THE COURT:** So what are the lost profits?

17 **MS. BEA:** Your Honor, I think what is being mixed
18 together is unjust enrichment which would disgorge profits, and
19 what we're talking about, which is actual damages for which you
20 can show: But for your conduct, I would have earned these
21 profits.

22 **THE COURT:** We're all on the same page. If they sold
23 something unjustly, you get that.

24 But you also have to show that you lost a sale.

25 Now, you can't lose a sale when your competitor never made

1 a sale.

2 **MS. BEA:** I believe you can, Your Honor. And I think
3 what the evidence will show is --

4 **THE COURT:** Who did you lose in sales? Who said,
5 Gosh. *We would have purchased that product, but Orange has --*
6 What? Party Call?

7 **MR. MIRENDA:** Party Call, Your Honor.

8 **THE COURT:** -- *so we're not going to buy yours.*

9 I haven't seen a lick of evidence that you all lost an
10 actual or even a proposed sale.

11 **MS. BEA:** Well, Telesocial -- first of all, they --
12 Orange should not be able to benefit from taking the
13 technology, and then botching it. They didn't make a sale, but
14 we'll introduce evidence that that's their own fault.

15 In the hands of Telesocial, with their knowledge about --
16 because they actually were a tech company that actually knew
17 how to make this product and knew how to get it out there,
18 Telesocial would have made sales. It would have been able to
19 penetrate this market.

20 And we're not talking about just Party Call. That is
21 somewhat of a misnomer in this case.

22 The backbone -- the core technology -- is the social
23 calling technology, which is private-facing APIs. I'm not a
24 coder, so that's the best as I can explain it; but Party Call
25 was one user application that was possible on that platform,

1 which, yes, they blatantly reverse-engineered and marketed as
2 their own, but it goes beyond Party Call. It goes to the API.

3 **THE COURT:** All right. You're going to have to -- it
4 can't just be: It stands to reason we had a great product, and
5 nobody bought it; therefore, it must be Orange's fault. That's
6 not going to be enough to get any damages; specifically
7 lost-profit damages. Okay?

8 So if you're telling me you're going to have a witness on
9 the stand who's going to say something to the effect of, *I had*
10 *five meetings set up, and when Orange made its announcement*
11 *with Facebook, all those meetings were canceled, and all of*
12 *those meetings were directed to negotiating the license for*
13 *this product*, then maybe we'll let it in, depending on what the
14 facts show.

15 But if you're planning just to have the founder come in
16 and say, *This was a great product. It was going to change the*
17 *world. And I couldn't sell a copy*, and that's it, that's not
18 going to be enough. Okay? That is not a sufficiently concrete
19 and nonspeculative basis for getting damages, including lost
20 profits.

21 So I will somewhat take this under consideration,
22 depending on proof at trial; but I think you have a tall
23 mountain to climb to show that there is a reasonable basis for
24 the jury to decide that profits were lost from the breach of
25 the ToU. All right? So we'll do that.

1 **MS. BEA:** I understand, Your Honor. And --

2 **THE COURT:** By the way, you all have this ritual
3 incantation at the end of each proposal about, *Please don't*
4 *speculate*. That will be said once, and not again. So all of
5 that will be excised from the individual jury instructions.

6 **MS. BEA:** Thank you, Your Honor. And I just want to
7 clarify. So will this be an instruction that's reserved until
8 after the presentation of evidence?

9 **THE COURT:** We'll do it at the close of the case.

10 **MS. BEA:** Right. Okay.

11 **THE COURT:** I'm sure there will be various
12 directed-verdict or JMOL motions along the way.

13 **MS. BEA:** All right. Thank you.

14 **THE COURT:** All right. So that one will be under
15 reserve.

16 **MS. CANDIDO:** Your Honor, sorry. I don't want to
17 interrupt your flow --

18 **THE COURT:** Yes.

19 **MS. CANDIDO:** -- but on 52 and 53 --

20 **THE COURT:** I haven't gotten there yet.

21 **MS. CANDIDO:** Oh, sorry.

22 **THE COURT:** Are we doing 52 or 53?

23 **MS. CANDIDO:** They're stipulated instructions, but I
24 noticed a typo, so I just wanted to point that out. Those are
25 breach --

1 **THE COURT:** Tell you what. Here. Let me see -- oh,
2 go ahead. Go ahead.

3 **MS. CANDIDO:** Those are breach-of-contract
4 instructions, but that is missing from the heading. All of the
5 other ones do say "Breach of Contract" in the heading.

6 **MR. MIRENDA:** Ah.

7 **THE COURT:** Oh, I see. I see.

8 **MS. CANDIDO:** So I just wanted to --

9 **THE COURT:** If I don't remember to add that --

10 **MS. CANDIDO:** We'll fix it in the next go-around.

11 **THE COURT:** Actually, I'm going to have you fix them.
12 Just make sure you fix that. Okay?

13 **MS. CANDIDO:** We'll try. Thank you.

14 **THE COURT:** Okay. Let's get to -- oh, Number 60.
15 That is not in the model rules -- the Model Instructions. I'm
16 not going to give that. I think it's also unnecessary.

17 Number 65. I am going to stick with CACI 4409, to the
18 letter. So that means two things.

19 First, there's no reasonable-royalty instruction here, and
20 you need to have that. So 4409 has a reasonable-royalty
21 provision. And I am going to have you add that.

22 **MR. MIRENDA:** Your Honor, if I may, because the
23 Kearl -- because of your ruling on the Kearl motion, I think
24 the reasonable-royalty piece of the plaintiff's claim dropped
25 out.

1 **THE COURT:** No, I don't think that's right.

2 Reasonable royalty does not require expert testimony. You can
3 have fact witnesses come in and lay the basis for reasonable
4 royalty.

5 How do they do that?

6 Well, for example, they might say, *We've had three license*
7 *negotiations, and we were offered this amount of money.* Now,
8 maybe those never came to fruition, but it's at least some
9 evidence for someone to say, *All right. They have had some*
10 *benchmark, or they had some other evidence that will come in.*
11 Reasonable royalty is not dependent on expert testimony. So --
12 and I do think we need it, because when you get to this with
13 Foster's, I'll save it for him, but I am going to add that.

14 Now with respect to apportionment, you know, apportionment
15 make sense to me if Orange actually sold the product and had a,
16 you know, reasonable claim that the product was your trade
17 secrets plus something else. And you need to carve that up.

18 You didn't sell anything, so I'm not sure what the
19 apportionment is supposed to go to.

20 **MR. MIRENDA:** It sort of goes in the reverse,
21 Your Honor. If they're going to come in and say that the
22 royalty that they were entitled to is for some universe of
23 things, that universe of things needs to be apportioned between
24 the trade secrets that I say they can prove that were
25 misappropriated, versus all of the other things that go into

1 that product, that go into that -- you know, the bundle of what
2 becomes the object of the license.

3 **THE COURT:** What other things?

4 **MR. MIRENDA:** Hopefully I made that clear. Maybe I
5 should say that again?

6 **THE COURT:** Your draft doesn't say that.

7 You say Telesocial must separate or apportion Orange's
8 profits.

9 That's not what you're saying now.

10 I mean, your draft says separated out.

11 There are no profits. Right?

12 **MR. MIRENDA:** That's correct, Your Honor.

13 **THE COURT:** So why did you all suggest that?

14 Withdraw it?

15 **MR. MIRENDA:** Withdrawn.

16 **THE COURT:** Okay. That's withdrawn.

17 Now, whether there's other apportionment, we'll see. And
18 apportionment is something that may be an issue. We're just
19 going to have to keep that reserved; but what threw me off was
20 the defendants' proposed version of apportionment didn't make
21 any sense to me, because you keep telling me you didn't sell
22 anything. So --

23 **MR. MYRE:** I think it came in the context of the lost
24 profits proposed instructions that Telesocial had had.

25 In response, our view was, *Well, if there is going to be a*

1 *lost profits, then it needs to be apportioned; but Your Honor*
2 *is right. It all sort of collapses, because the lost-profits*
3 *piece doesn't exist.*

4 **THE COURT:** That will be deemed withdrawn by the
5 defendants. Okay. Not the concept. If we need apportionment,
6 we'll deal with it -- but as drafted in defendants' Instruction
7 65.

8 **MR. MIRENDA:** Thank you.

9 **MS. CANDIDO:** Your Honor, I think we don't need to go
10 into it now because we're not going to address it now, but I
11 would just state that we disagree with the applicability of
12 apportionment, especially defendants' assertion of patent
13 concepts of apportionment to trade secrets. I -- they're
14 relying entirely on patent law. I don't think the concepts
15 carry over to trade secrets in the same way.

16 **THE COURT:** Well, there is a body of law that is
17 separate and apart from *Georgia Pacific* and patent law that
18 says you do have to have some apportionment. And that is just
19 basic damages. It's not patent driven.

20 Now, whether we end up doing it or not -- we're going to
21 have to see what happens at trial. Okay?

22 **MR. MIRENDA:** Thank you, Your Honor.

23 **THE COURT:** I think that's it for the disputed
24 instructions. Did I miss any?

25 **MS. CANDIDO:** I think that's right. I think the

1 remainder of the damages one relates to the speculation issue
2 --

3 **MR. MIRENDA:** As long as it's said in one place,
4 Your Honor.

5 **THE COURT:** So what I'd like you to do is -- you both
6 worked well on this. So if you would provide a set. Okay?

7 Now, number it the right way. Right now, you know, just
8 number it in sequential order. And revise it in a way that's
9 consistent with sample. The first instruction is Instruction
10 Number 65. All right?

11 **MS. CANDIDO:** Sorry.

12 **THE COURT:** Just start it with 1, sequentially all
13 the way through. You'll have a minute notes tomorrow or
14 Monday, which will guide; will help refresh you on what we
15 discussed today. And then write up a set that is consistent
16 with what I've ruled on today. Okay?

17 **MS. BEA:** I want to make sure I'm not making an
18 assumption. Disputed Jury Instruction Number 66 is also on
19 deck, but I assume you want to resolve that along with --

20 **THE COURT:** Sixty-six?

21 **MS. BEA:** That is the instruction as to lost business
22 value.

23 **THE COURT:** Oh, yes.

24 **MS. BEA:** I assume we can probably resolve that along
25 with --

1 **THE COURT:** We're going to have that discussion now.

2 By the way, the royalty language is in 4409. Okay?

3 **MS. CANDIDO:** We had actually negotiated at one point
4 a set of royalty --

5 **MR. MIRENDA:** Yes, that were based on that.

6 **MS. CANDIDO:** -- so we can put that back in the next
7 draft.

8 **THE COURT:** If you both agree, that's fine; but if
9 you don't agree, I'm going to use what --

10 **MS. CANDIDO:** It was based off of that --

11 (Simultaneous colloquy)

12 **MR. MIRENDA:** -- it's 4409. Tied to the case.

13 **MS. CANDIDO:** Okay. We're good on that.

14 **THE COURT:** Okay. Who is going to discuss Mr. Foster
15 with me?

16 **MS. DURIE:** I will, Your Honor.

17 **THE COURT:** All right. Ms. Bea, I'm going to start
18 with you. I am just having a hard time understanding the
19 damages case.

20 Now, before anybody overreacts -- I'm not saying that you
21 will -- if there is a misappropriation, we're going to have to
22 figure out some remedy. Okay. This is not going to be a wrong
23 without a right.

24 The problem I'm having is, given the facts of this case.
25 A very-early-stage company. Unproven, untested technology.

1 And basically, one, it appears to be, as far as I know, one
2 potential suitor; the firm of the defendant. A valuation of
3 actual loss to Telesocial seems very hard to do in a
4 nonspeculative fashion, without getting too far afield, which I
5 think Mr. Foster does. Gains to Orange seem to be nonexistent,
6 because they never sold the product. And it looks to me like
7 reasonable royalty is probably going to be your best bet.

8 Now, that's all a long lead-in into why Mr. Foster is not,
9 in my view, fitting the bill on what the damages are going to
10 be.

11 Now, I have no complaint, as I said last time, with his
12 qualifications. He's an eminently qualified person in his
13 field. There's nothing disqualifying about his background.
14 There's nothing disqualifying about his method. For what it
15 was, his method was fine.

16 The problem is it's just not fitting a reasonable
17 nonspeculative measure of damages in this case. The lost
18 enterprise value projected into the future -- it's just not a
19 cognizable trade-secrets breach or misappropriation remedy.

20 So what have I missed?

21 **MS. BEA:** Your Honor, I think that the case *Vehicular*
22 *Technologies* is actually instructive. In that case the
23 plaintiff's damages expert explicitly offered a similar measure
24 to Professor Foster's, in that he -- and this is a quote from
25 the case -- "He computed the worth the business would have

1 had" -- end quote -- at a future date, absent the defendant's
2 misconduct in that case. That's precisely what we're doing
3 here.

4 The Court noted that *Vehicular* -- similar to what
5 Telesocial will present, *Vehicular* presented evidence that with
6 without defendant's tortious conduct, it would have been able
7 to pursue a prosperous business in social-calling technology.

8 **THE COURT:** Let me just jump in on that, because we
9 carefully considered that case. Now, it's an unpublished Court
10 of Appeals case, as you know. There's nothing inherently wrong
11 with that, but it's not particularly persuasive. It's not
12 something that appears to have been -- it's certainly not
13 published in a way that endorses it. And it certainly hasn't
14 been followed in any other case that I'm aware of in
15 California; and you haven't shared any with me.

16 The problem I have is I think you're reading way too much
17 into that. I mean, I think there was a much more solid factual
18 foundation for the \$17 million that eventually get awarded here
19 that went right to Tractech -- or whatever the defendant's
20 name -- is tortious conduct in a way that you're not -- you
21 don't have that same sort of factual link here. So I don't
22 think that case stands for the proposition that you're
23 suggesting.

24 I'm particularly skeptical about -- just to jump ahead, in
25 case you're going there, the *Electronic Funds* case. I mean,

1 that case does not say anything close to what you all proposed.
2 That case, in fact, expressly says, *Plaintiffs have cited no*
3 *legal authority to support a damage award equaling the current*
4 *value of defendant's business, and we are aware of that.* I
5 mean, it says exactly the opposite of what it was presented to
6 me to mean by Telesocial.

7 So, you know, you're zero and two on the cases. And I'm
8 not seeing any case that allows you to get this kind of model
9 that Mr. Foster would like to present to the jury. So what's
10 wrong with the reasonable royalty? Why can't you just go with
11 that? I mean, that is the default. If you can't show actual
12 damages and actual losses, and you can't show that the
13 misappropriater has, you know, received ill-gotten gains
14 because those numbers are too hard, reasonable royalties --
15 they're exactly for that. You don't -- you know, you don't
16 need to have an expert for that. You can have people come in
17 and say, *Here's what we think the license would have been, and*
18 *here's why."*

19 **MS. BEA:** Your Honor, at this stage the question is
20 whether or not Telesocial's entitled to present evidence of
21 lost business value at trial. And certainly that's plaintiffs'
22 burden, is to go and prove that.

23 But Telesocial doesn't --

24 **THE COURT:** You're wanting to do it through an
25 expert. So there is a *Daubert* door you have to walk through

1 first. Okay? And Mr. Foster --

2 **MS. BEA:** Yes, and I would like to address that.

3 **THE COURT:** Mr. Foster -- first, as an initial
4 proposition, he's coming up with a damages theory that is not
5 within mainstream trade-secrets damages measures. It is not
6 based on actual loss to Telesocial. It is not based on any
7 actual gain to Orange. And it is not a reasonable royalty. So
8 already he's way outside the box for what is conventional
9 trade-secrets damages.

10 He compounds that by saying, *Well, I'm going to look at*
11 *Telesocial in X period of time down the road, and use that*
12 *future value, which is dependent on these two completely*
13 *speculative events happening along the way, to come up with my*
14 *valuation.*

15 That's just too far out of the field.

16 **MS. BEA:** Your Honor, I'd like to address both those
17 points in reverse order, if we can start with --

18 **THE COURT:** Sure.

19 **MS. BEA:** -- the notion that Professor Foster's
20 projecting into some long distance in the future.

21 Actually, Orange's misappropriation conduct occurred over
22 a period of many, many months. And Professor Foster's estimate
23 of Telesocial's value, absent that misappropriation, is pinned
24 right in that time period when the misappropriation was
25 occurring, and takes into account not just the first access and

1 the second access and the copying that happened in September,
2 but the pervasive copying that happened through November, and
3 culminated with a global presentation.

4 **THE COURT:** Where does it say that?

5 Because I see Mr. Foster being asked on page 6 of his
6 report to provide an estimate of Telesocial's value as a
7 company, assuming liability, and that the following two events
8 would have occurred. It would have entered into a contract
9 November 2012 with Orange; and they would have completed a
10 Series B financing, you know, sometime after that, with some
11 unknown finance entity.

12 That's a far cry from saying in November of 2012, here is
13 my view of what Telesocial was worth as a company. Period.

14 So if he said that, you know, I might be inclined to let
15 you roll the dice a little bit; and if I am satisfied at trial
16 that he had the basis for it, I might let it go.

17 I'm not ruling out lost business, per se.

18 Business. Okay?

19 But the person that you have designated to be your witness
20 on that isn't testifying on lost business, per se.

21 He's testifying on: Here's what Telesocial would have
22 looked like if, in addition to being the victim of
23 trade-secrets misappropriation, these two other highly
24 speculative events occurred downstream; and possibly downstream
25 by a matter of a year or two.

1 That's just not -- it's not just not within the realm of
2 reliable, nonspeculative, reasonable basis for damages.

3 **MS. BEA:** Your Honor --

4 **THE COURT:** Now, is he able to say -- does he say --
5 Now, let me pause for a moment.

6 Anything to add, Ms. Durie?

7 **MS. DURIE:** No, Your Honor.

8 **THE COURT:** Is he able to say -- is there anything in
9 there? I mean, I've read this thing. And you tell me if I've
10 missed it. If he has said somewhere, *Well, here is*
11 *Telesocial's value as of this date in 2012. And, you know,*
12 *there it is*, I mean, I think that's about all you can do,
13 because the rest of these opinions are off the board.

14 **MS. BEA:** I understand. Professor Foster did
15 actually address this during his deposition. I apologize I
16 don't have the cite, but he was asked to point that. And he --
17 he addressed that in November 2012.

18 **THE COURT:** What did he say?

19 **MS. BEA:** Was the time period.

20 **THE COURT:** What did he say?

21 **MS. BEA:** He said he was measuring as of November
22 2012, taking into account that period of time --

23 **THE COURT:** I mean, is it in his report? Is it in
24 this?

25 **MS. BEA:** I mean, perhaps not as clearly as it would

1 be helpful for the Court right now, but --

2 **THE COURT:** Is there anything in here that really
3 says that?

4 **MS. BEA:** Where he --

5 **THE COURT:** Can you just talk about the actual -- his
6 estimation of the actual value as of November 2012 or sometime
7 in 2012 without conditionals? Hypotheticals? Anything? Does
8 he ever say that anywhere?

9 **MS. BEA:** I don't want to speculate for you. I
10 thought that was addressed this his report. It was my
11 understanding of his opinion. And I know it was addressed
12 during his deposition.

13 **MS. DURIE:** Your Honor, I took Professor Foster's
14 deposition. He did not offer an opinion that was not
15 predicated on the assumption that there was a Series B round,
16 and that there was some transaction with a major telco carrier.
17 His opinions were all predicated on these hypotheticals having
18 come to pass.

19 **THE COURT:** Is that right, Ms. Bea?

20 **MS. BEA:** Yes. Those two hypothetical assumptions
21 are assumptions that he made in forming his opinion. His
22 opinion focuses on a valuation based on those assumptions. And
23 I grant Your Honor it will be Telesocial's burden at trial to
24 prove that those assumptions are not speculative; but those are
25 factual assumptions. And those issues of fact cannot be

1 resolved on a *Daubert* motion.

2 **THE COURT:** Well, that's not quite right. They have
3 to be -- it has to be a valid, reasonable, and reliable expert
4 opinion before it's admitted. And the first measure of that
5 is: How does this fit the case?

6 And he's not within the ballpark of any of the mainline,
7 well-established measures of trade-secrets damages, as we've
8 already discussed. So I just really --

9 **MS. BEA:** Your Honor, the --

10 **THE COURT:** I can't see what he's going to do.

11 Now, you don't need an expert. I've been clear about
12 this. Someone can come in -- your CFO, your CEO or founder,
13 whoever, a venture capitalist who has a good view of the
14 company from direct investment. That person can come in and
15 say, *Here's what the company was worth.*

16 How do I know that?

17 *Well, we had 100,000 shares, and we were selling them for*
18 *\$4 a pop.*

19 I mean, that's a perfectly fine measure of: Here's where
20 we think the company was. If anything, it would be
21 conservative, because it may not take into account certain
22 other factors that a person might use to reasonably address
23 that figure. You can do that. You can have people come in and
24 say all of the things I talked about earlier. *We had ten*
25 *meetings lined up. And as soon as Party Call on Facebook hit*

1 the scene, people canceled, and we lost all of that
2 opportunity. You can have that kind of thing, too.

3 I had a patent trial here where the experts were
4 disqualified, and the plaintiff put on a *Georgia Pacific* case,
5 no less. Sixteen factors, with no experts, and they won. And
6 I sustained the award.

7 So you don't have to have experts, but Mr. Foster is just
8 not going to do it. So his testimony is going to be excluded
9 for lack of physical damages in the case.

10 **MS. BEA:** Thank you, Your Honor.

11 **THE COURT:** All right. I think that does it. Is
12 there anything else I can help you with today?

13 **MS. BEA:** Can I ask for clarification actually?

14 **THE COURT:** Yes.

15 **MS. BEA:** You said earlier in this discussion that
16 you're not precluding the measure of lost business value, per
17 se. Does that mean as to Instruction 66 -- Jury Instruction
18 66, you are preventing that as a measure of --

19 **THE COURT:** I will leave an open mind. If it is
20 given to me special -- you know, not special -- but given the
21 specific facts of this case, if it turns out this was a nascent
22 company with one big idea, and that's it, and one big idea was
23 misappropriated, and as a result of that, the company lost all
24 its investments or everybody withdrew, knob gave them money, it
25 had to close its doors --

1 Oh, by the way, I'm just talking off the top of my head.

2 MS. BEA: I understand, Your Honor.

3 THE COURT: None of this is carved in stone. This is
4 all subject to briefing and refinement.

5 -- then, you know, it's probably within the realm of
6 possibility that a jury could hear that, and make a reasoned
7 and reasonable estimate of damages, but you're going to have to
8 have facts that support all of that. It cannot just be an
9 interested party, like an investor or founder, coming in and
10 saying, *This was \$100 million idea. And we never made a penny.*
11 *Consequentially, we're owed \$100 million.* That's just not
12 going to work.

13 MS. BEA: Okay.

14 THE COURT: Okay?

15 MS. BEA: I think one remaining issue that would need
16 to be resolved then, only because it's been raised in
17 discussions on the pretrial papers with defendants -- I just
18 want to confirm that that also means that their experts that
19 are rebuttal experts to Professors Kearl and Foster are also
20 excluded as a consequence. They were never disclosed as
21 affirmative experts, only --

22 THE COURT: Rebuttal experts, then there's nothing to
23 rebut. I mean, is there anything else that those people say?
24 They weren't called for any other reason; were they?

25 MR. MIRENDA: Well, I think, Your Honor, I guess it

1 would depend on what latitude Your Honor gives to the lay
2 witnesses to testify as, you know, sort of pseudo experts; that
3 there might be a reason to --

4 (Simultaneous colloquy)

5 **THE COURT:** They're not testifying as pseudo experts.
6 You get that concept? No one is a closet, covert, special-ops,
7 undesignated expert. That's not happening.

8 They are testifying as one thing only: Percipient fact
9 witnesses. That's it.

10 You got two flavors. There's nothing in between. There's
11 no DMZ where someone can kind of, you know, crawl under the
12 barbed wire and be a semi expert. That's not happening.
13 There's no semi or pseudo in this courtroom. You're either a
14 fact witness or you're an expert. That's it. So if they're
15 just rebuttal people, I don't think you need it.

16 **MR. MIRENDA:** That's fine, Your Honor.

17 **THE COURT:** Anything else?

18 Yes. Come on up.

19 **MR. BRIGGS:** Your Honor, I wanted to raise one issue
20 with respect to the witnesses that Orange is planning on
21 bringing to trial.

22 **THE COURT:** Can I jump in for one moment? Is the
23 "Orange," or "Orange"?

24 **MR. MIRENDA:** Yes. All of the emphasis -- including
25 the company employees, use both pronunciations.

1 **THE COURT:** What do you want me to say? I'll let you
2 decide. "Orange" or "Orange"?

3 **MR. MIRENDA:** Orange, I think, Your Honor.

4 **THE COURT:** Orange? All right. Good. All right.
5 Witnesses.

6 **MR. MIRENDA:** Individual defendants piece first, or
7 the witness list?

8 **MR. BRIGGS:** Let me go through the witnesses first.

9 So they've indicated to us that they plan on bringing 13
10 witnesses live to trial. We would like to call six of those
11 witnesses in our case; but they've informed us that three of
12 the six witnesses that we would like to call will not be
13 available during the first week, which is the week of April
14 10th, which is when we're going to be putting on our case.

15 And one of the reasons we've heard for one of the
16 witnesses is that her daughter is having surgery. And we
17 completely understand that. And we can probably have her go
18 the following Monday. But the other two witnesses we would
19 like to have come testify, live.

20 And we believe that they should come the prior week,
21 because, you know, this trial's been scheduled for
22 approximately six months now. And we think it's unfair if they
23 only have their witnesses come to testify live during their
24 case, but not during our case.

25 **THE COURT:** Let me just jump in on this. I'm glad

1 you mentioned this. I will address that.

2 We're not bifurcating the case into two cases-in-chief, so
3 a witness comes once. And you do everything you do with that
4 witness, and that's it. Okay. So there's no cross; wait a
5 week; and then defendants call the witness back for direct.
6 It's not going to happen.

7 So it's going to be --

8 And spare yourself also the beyond-the-scope objection,
9 because there's not going to be any beyond-the-scope. All
10 right? It just doesn't happen when I set it up this way. So
11 you have them here, and that's it.

12 There will be a point where the plaintiff is done, and you
13 will tell me "We rest" at that point; but at that point, about
14 80 percent probably of the case is going to be over for
15 everybody, because the witnesses are going to be here. So they
16 won't be coming in their case. It just might be not be fitting
17 your narrative timeline, which is an issue.

18 Why can't those two people be here earlier?

19 **MR. MIRENDA:** Well, Your Honor, the two particular
20 people both have family conflicts for that week of the 10th,
21 which was what we informed Telesocial of. I think that --

22 **THE COURT:** Are they named defendants?

23 **MR. MIRENDA:** No, Your Honor, they're not. They're
24 witnesses. They're not defendants. And --

25 **THE COURT:** Are they available on video?

1 **MR. BRIGGS:** I think one of the two is a named
2 defendant. Ms. Benrikhi.

3 **MR. MIRENDA:** Yeah.

4 **THE COURT:** One named defendant and one third party?

5 **MR. MIRENDA:** And one third party.

6 **THE COURT:** Would you be happy doing them by video?
7 Is that adequate for the plaintiff?

8 **MR. BRIGGS:** Well, given Your Honor's ruling on that
9 second issue that we were going to raise, you know, the number
10 of times a witness testifies --

11 **THE COURT:** It's one and done. That's it. There's
12 no comebacks.

13 **MR. MIRENDA:** That was our view. It should be one,
14 done.

15 **THE COURT:** But if they have two people on your team
16 who are important to your case, we have to accommodate them.

17 **MR. MIRENDA:** Well, I appreciate that, Your Honor. I
18 think once the threshold has been crossed that it's, you know,
19 one witness, and done, I think the realistic course of their
20 case is going to take us beyond Friday, in any event; that is,
21 we're talking about whether these two witnesses testify as the
22 eighth and ninth witnesses that we call, or as the 11th and
23 12th witnesses that they call.

24 **THE COURT:** Well, Mr. Briggs has the right to present
25 his case in the format he wants. I mean, are these people that

1 you want early for some reason?

2 **MR. BRIGGS:** Actually, those two witnesses were ones
3 that we wanted earlier in the case.

4 **THE COURT:** All right. Okay.

5 **MR. BRIGGS:** And we can make the exception with
6 Ms. LeDrogo, but for all three, it really puts a burden on our
7 case and our ability to present the case we want to present.

8 **THE COURT:** You know, trial is an inconvenience for
9 everyone, starting with the jury. And I --

10 **MR. MIRENDA:** I understand, Your Honor.

11 **THE COURT:** It's just a reality of life that when
12 trial's been set for many, many months, it's very hard for me
13 to say, you know, an undefined family obligation is going to be
14 a barrier to getting the case-in-chief done. And I just --

15 You know, surgery? Fine. We all agree.

16 Is it Ms. LeDrogo?

17 **MR. BRIGGS:** Yes.

18 **THE COURT:** Family medical problem?

19 **MR. MIRENDA:** Yes, Your Honor. Exactly.

20 **THE COURT:** We're not going to force that issue.

21 But the other two are going to have to be here. You're
22 going to have to make it work. It's not fair to the plaintiff
23 to have two key witnesses come at the tail end of their case.
24 It throws the whole thing off. That's just not reasonable.
25 We've known about this for -- I think it's been more than six

1 months. It's been at least six months. So you're going to
2 have to tell them. Look. You blame me. *The old judge in*
3 *San Francisco said you have to be here.* Okay? All right.

4 Anything else I can help you with?

5 **MR. MIRENDA:** Then there's a sort of a second issue,
6 Your Honor, with respect to individual -- number of individual
7 defendants. The plaintiffs have offered a conditional offer to
8 dismiss certain of the individual defendants, on the condition
9 that the other defendants not ask them questions about whether
10 they were defendants, and whether they had been dismissed.
11 That issue obviously goes to their credibility.

12 The situation that it puts us in -- because, as the Court
13 knows and as Telesocial knows, we represent the group of the
14 company and all of the individuals -- is that a conditional
15 offer like this raises a potential conflict situation. And so
16 we would need to arrange --

17 **THE COURT:** A client conflict?

18 **MR. MIRENDA:** As between an individual who's been
19 offered a dismissal conditioned on another defendant who's
20 going to remain in the case agreeing to limit their examination
21 of that person as a witness. That's the offer that they've
22 made. And it puts us in this -- you know, it happened a couple
23 days ago. It puts us in this potential conflict situation. As
24 a matter of professional responsibility, we feel like we need
25 to have the individuals get independent counsel on whether or

1 not to accept that offer. And the other defendants, of course,
2 have to decide whether they're going to agree or not. Since we
3 represent them all, we can't advise each of them as against the
4 other. So the conditional nature of offer puts us in this
5 difficult position. And we wanted the Court's guidance on how
6 to deal with that, you know, given --

7 **THE COURT:** Let me just make sure I understand.

8 So the deal's going to be: Telesocial will drop, let's
9 say, five people, so long as none of the remaining witnesses
10 mention their name? Is that the deal?

11 **MR. BRIGGS:** (Shakes head from side to side).

12 **MR. MIRENDA:** So long as none of the remaining
13 defendants ask those people who come to testify -- those
14 now-dropped defendants -- ask them, *Were you named as a*
15 *defendant?*

16 *Yes.*

17 *Were you dismissed from the case?*

18 *Yes.*

19 You know, questions about the fact that they were
20 defendants, and recently dismissed, which --

21 **THE COURT:** How would that even come up?

22 **MR. MIRENDA:** Well, it goes to the -- potentially
23 goes to the credibility of the witness.

24 **THE COURT:** Just don't bring it up. Why would you
25 bring that up?

1 **MR. BRIGGS:** No. We don't want to bring that up.
2 We're concerned that they may bring it up. For example, there
3 are 12 individual defendants.

4 **THE COURT:** Right.

5 **MR. BRIGGS:** We're making a good-faith effort to
6 narrow this case before trial.

7 **THE COURT:** That's perfectly reasonable.

8 **MR. BRIGGS:** So we want to just keep the key people
9 in. There are four of them. So we've offered to drop eight of
10 them. We just want to make sure that Orange or perhaps the
11 other defendants don't make reference to the jury that these
12 other people were once defendants, and we dropped the case
13 against them.

14 **THE COURT:** What's wrong with that? Why would you
15 even bring that up? I'm --

16 Let me make life easy. You're barred from saying that.
17 It's totally irrelevant. And potentially that should solve any
18 conflict issue, even if a conflict -- I'll let you decide that.
19 I don't have any idea, but no one is going to comment on any
20 dismissed defendants. That's just not appropriate. Okay? So
21 I think that solves the problem.

22 All right. So who are the eight you're dismissing? Just
23 at some point, file something. Okay?

24 **MR. BRIGGS:** We're working on a stipulation with
25 them, but it got hung up because of this issue.

1 **THE COURT:** You don't need a stipulation. Just say
2 *The following defendants are voluntarily dismissed.* Give me
3 their names. You don't need anything else.

4 Anything else I can help you with?

5 Yes.

6 **MS. CANDIDO:** Very minor issue. So reading Your
7 Honor's Standing Order about the exhibits, we just wanted to
8 make sure we were very clear with respect to just tabbing or
9 sticker the exhibits.

10 **THE COURT:** Tabs.

11 **MS. CANDIDO:** Your Honor --

12 **THE COURT:** Sticks?

13 **MS. CANDIDO:** -- are electronic versions of the --

14 **THE COURT:** Oh. You mean for the marker?

15 **MS. CANDIDO:** For the exhibit stickers or tabs; the
16 indication of the number on the exhibit. You don't require an
17 actual physical sticker? You're okay with an electronic --

18 **THE COURT:** This is beyond the Judge's skill set.

19 Ms. Clark, what do we usually prefer?

20 **THE CLERK:** The label needs to say --

21 Have you seen the --

22 **MS. CANDIDO:** Yeah. As long as it says what it says,
23 it doesn't have to be an actual, like --

24 **THE CLERK:** No. If you want to incorporate it in the
25 document, as long as it's not covering --

1 **MS. CANDIDO:** There was something the way the
2 language written that we were being a little hypersensitive
3 about it sounding like it required a sticker.

4 **THE CLERK:** Yeah. Just don't cover anything. That's
5 fine.

6 **MS. CANDIDO:** We're good with that.

7 **THE CLERK:** Okay.

8 **MS. CANDIDO:** The only other question was: To the
9 extent that the defendants are going to be examining Orange
10 witnesses in the plaintiff's case beyond the scope of their
11 direct, and effectively putting on their direct in our case,
12 does Your Honor's rulings regarding the disclosure of direct
13 exhibits apply then to the defendants, as well?

14 **THE COURT:** Witnesses show up once. Okay? You're
15 going to disclose who's doing what when a day and a half
16 before? I can't remember my order.

17 **MS. CANDIDO:** Two days before. 4:00 p.m.

18 **THE COURT:** You're going to share the exhibits and
19 work out any objections to the extent you can. And if you
20 can't, you're going to share them with me that morning, and
21 I'll quickly go through them. We can do that. If not, you can
22 do it on the stand. There's no "beyond the scope." We're just
23 going to get it done. Okay? You know, nobody stands on the
24 case-in-chief thing anymore. We just don't do that in federal
25 court. Okay? All right.

1 **MS. CANDIDO:** It's a two-way street, is what I'm
2 confirming.

3 **MR. MIRENDA:** I think we understand that. And I
4 guess the related question there -- in terms of the travel for
5 witnesses traveling from France, if we were to know the
6 sequence of when or the day on which the plaintiffs expect to
7 call them. And we're talking about the two witnesses who are
8 now going to come that first week.

9 **MS. CANDIDO:** We can work that out.

10 **MR. MIRENDA:** We just need to have enough advance
11 notice, so we can arrange for the hotels and planes.

12 **THE COURT:** I think that's fair. Just project to the
13 best of your ability for these two people maybe specifically.
14 Okay? So whatever you can work out. I mean, you both seem to
15 have gotten along well, so make it happen.

16 Now, so you're going to call 13 witnesses?

17 **MR. MIRENDA:** We're bringing all of the Orange
18 witnesses; both the ones that plaintiffs have identified, and
19 the ones that we've identified. There's a substantial overlap.

20 **THE COURT:** But excluding the eight. Right? The
21 eight are now off the table. The eight defendants that are
22 being dismissed?

23 **MR. MIRENDA:** Right. Several of them are still
24 coming as witnesses, Your Honor. They have to be able to talk
25 about the activity.

1 **THE COURT:** Okay. All right.

2 **MR. MIRENDA:** So we've provided the Witness List.
3 There's, I think --

4 **THE COURT:** Are the depositions in English or --

5 **MR. MIRENDA:** -- a total of 26 witnesses, with a
6 substantial amount of overlap.

7 **THE COURT:** Are the depositions in English or French?

8 **MR. MIRENDA:** They're primarily in French,
9 Your Honor.

10 **MS. CANDIDO:** With translation.

11 **THE COURT:** With English subtitles?

12 **MR. MIRENDA:** It's -- they're coming. They're going
13 to come. It's very difficult. They're very slow. Long gaps
14 in the --

15 **MR. MYRE:** They speak in French. It's translated.
16 You know, I ask a question in English. Translator translates
17 it into French. French witness answers a question in French.
18 Translator translates it into English.

19 **THE COURT:** English subtitles in case people --

20 **MR. MIRENDA:** I think the answer was that there
21 weren't going to be any video depositions, because all of the
22 people were coming in person.

23 **THE COURT:** Oh.

24 **MR. MIRENDA:** We were trying to avoid the idea of
25 having to present long videos to the --

1 **THE COURT:** So the witnesses are going to be using a
2 translator?

3 **MR. MYRE:** That's correct. Same format as the
4 deposition, which might take some time.

5 **THE COURT:** How many witnesses need that?

6 **MR. MIRENDA:** I don't know, off the top of my head,
7 Your Honor.

8 **MR. MYRE:** Thirteen.

9 **MR. MIRENDA:** Maybe ten or twelve.

10 **THE COURT:** Out of 26?

11 **MR. MIRENDA:** Out of 26, approximately.

12 **MR. BRIGGS:** This is one reason in our pretrial
13 statement we asked for 21 hours per side rather than your
14 default time.

15 **THE COURT:** Let's just see how it goes. Okay? Plan
16 on 16. And if it turns out to be painfully slow, I may revise
17 that. Okay? But let's just bank on 16.

18 You know, I have had trials with non-English-speaking
19 witnesses, and it actually goes a little bit faster than you
20 might think.

21 **MR. MIRENDA:** I would expect it could, Your Honor.

22 **THE COURT:** Is it the case -- this may not be a
23 detail than we need, but is it the case where some of the
24 witnesses actually have some English skills; they're just not
25 fully confident?

1 **MR. MIRENDA:** Yes, Your Honor. I think there are a
2 range of people. Some are much more confident, and would try
3 to testify significantly in English. And others --

4 **THE COURT:** So maybe one of the witnesses will get
5 80 percent of the question, does not want to do it in English,
6 to be accurate, but is going to be able to snap right out; not
7 be hung up on a translation?

8 **MR. MIRENDA:** Exactly. And then, you know, whatever
9 technical questions or -- you know, we lawyers sometimes ask
10 complicated questions that are difficult to translate. So they
11 might need a little bit more help there. But yeah, I think so.

12 **THE COURT:** Okay. All right. So by Thursday, then,
13 I'll get the revised full set of jury instructions. And I want
14 also a set of the preliminaries. I will give you a case
15 citation or two to look at. And we can use those as models for
16 the preliminaries. I will give you my revised *voir dire* --
17 proposed *voir dire* sometime next week. The Verdict Forms I
18 need to do a little bit of work on, but I will do those, as
19 well. And you're going to give me a joint case statement for
20 the venire panel by next Thursday.

21 **MR. MIRENDA:** Yes.

22 **THE COURT:** And I think that's it.

23 Is there anything else?

24 **MR. MYRE:** Yeah. There's one more related to this
25 translation issue. There's an issue if with the exhibits.

1 **THE COURT:** In French?

2 **MR. MYRE:** Yeah. So there's two different ones.

3 One set is when we took these depositions back in
4 September. We translated a couple hundred documents. So we
5 have certified translations behind the actual French document
6 that's produced by Orange.

7 They objected on the record at deposition to some of the
8 transcripts [sic] -- or to some of the translations, but then
9 never took it any further. And this is, again, back in
10 September 2016.

11 We understand now that they're going to come back and try
12 to change some of the translations that were actually used with
13 the deponents. They're in the record. This is what the
14 person --

15 **THE COURT:** Well, it's a little late.

16 **MR. MYRE:** I agree, Your Honor.

17 **MR. MIRENDA:** Your Honor, I really do need to address
18 this, because that's -- regrettably, that is not an accurate
19 description of what occurred during the depositions.

20 **THE COURT:** These are September 2016 depositions?

21 **MR. MIRENDA:** These depositions in the past -- in the
22 fall.

23 Back in May when we were organizing to take 16 depositions
24 in France, we proposed to Telesocial that they -- that we work
25 out translation issues. We understood they were going to be

1 using documents at these depositions; that we work out
2 translation issues. We proposed we do that.

3 They did not take us up on that proposal. Instead, they
4 came to the depositions with French documents with partial,
5 incomplete English translations. Not certified. No indication
6 of who the translator was, or what the translator's
7 qualifications were.

8 We immediately objected to those documents.

9 In every deposition there were extensive discussions.

10 I'll give you one example. There's -- this was
11 Mr. Johnson. *I should mention there's a translation of a*
12 *French e-mail, in part, on the front part of this exhibit.*

13 Then I'm -- this is actually me.

14 *I'm going to object. Obviously, we've raised this issue a*
15 *number of times. We object to the translations; the English*
16 *translations. This hasn't interfered with the progress of the*
17 *depositions, but I think -- as I think I agreed with Mr. Briggs*
18 *or Mr. DeFranco back in the first depositions, we are going to*
19 *work out what the translations would be.*

20 So the witnesses looked at the original French. All of
21 the witnesses are French. They're reading their original
22 e-mails. They weren't relying on the translations in the
23 depositions. So the depositions went forward.

24 **THE COURT:** What is the issue?

25 **MR. MIRENDA:** What they would like to do is present

1 to the jury these false --

2 **THE COURT:** No, no, no. Only certified translations.

3 **MR. MYRE:** They were all certified, Your Honor.

4 **THE COURT:** They have to be certified for the
5 United States District Court; not just certified by a good
6 speaker of Berlitz.

7 **MR. MYRE:** Understood, Your Honor.

8 **MR. MIRENDA:** We have not seen any certifications.

9 **THE COURT:** You need a Court-certified interpreter to
10 do this.

11 **MR. MYRE:** I understand, Your Honor. And we have
12 one.

13 **MR. MIRENDA:** They did not provide us with
14 certifications or certified translations back then. They still
15 haven't provided us with --

16 **THE COURT:** Well, you have until April 10th. Now, if
17 there are documents in French that you intend to use, get the
18 certification process worked out now.

19 **MR. MYRE:** Understood.

20 **THE COURT:** I will not accept anything that is a
21 unilateral translation. It has to be a Court-certified
22 interpreter, and you all agree on it.

23 If you don't agree on it, then I'm just going to do
24 whatever that translator said if that translator's certified.

25 **MR. MIRENDA:** So we'll raise whatever objections, if

1 there are particular ones, once we see the certified
2 translation.

3 **THE COURT:** Get whatever exhibits you plan to use,
4 and make sure you get a certified English translation.

5 **MR. MYRE:** Yes. So that raises a second issue, you
6 know. Trials in 17 days. And we -- you know.

7 **THE COURT:** It's a lifetime.

8 **MR. MYRE:** Yeah. And they have a number of exhibits
9 on their list.

10 **THE COURT:** You might even settle. You have 17 days
11 to settle.

12 **MR. MYRE:** There are a number of exhibits on their
13 list that are in French, because they produced them in French.
14 And they tell us that they're translating them.

15 We still have never seen them. So I have never been able
16 to read one of those documents.

17 **THE COURT:** The order is: Get all of your
18 French-document translations done in the next 17 days. So when
19 you walk in on Monday, the 10th, it's all in the bag. You just
20 pull them out and say, "Here is" -- you stand up and I will
21 tell the jury, *This is an agreed-upon, certified translation.*
22 *And bank on it.* That's what you are you going to do.

23 **MR. MYRE:** Understood. I think the broader issue
24 here.

25 **THE COURT:** I have some French skills. I will not

1 wheel them out, because they're rusty. It's not that hard to
2 translate. This is not the type of language where there is
3 immense ambiguity between French terms and English terms. So
4 this shouldn't be that hard.

5 **MR. MYRE:** I think the bigger issue is a preparation
6 issue, Your Honor. If I don't get them until the day before
7 trial, and I don't have any French skills --

8 **THE COURT:** You're going to work that out over the
9 next 17 days, which means you're going to share with each
10 other. *Here's my stack of French documents.* And Orange will
11 have its stack. And then you're going to send them to someone.
12 And you're going to say, *Please produce a certified*
13 *French-to-English translation.*

14 **MR. MIRENDA:** We've already started that process,
15 Your Honor.

16 **THE COURT:** It has to be Court certified. All right?

17 **MR. MIRENDA:** Absolutely.

18 **THE COURT:** Can't be someone who's bilingual. I've
19 had a problem with this. It has to be Court certified. So if
20 you have trouble with that, we can find a list for you. Do you
21 already have somebody?

22 **MR. MIRENDA:** Yes, Your Honor. We're using Geotech
23 (phonetic) service.

24 **THE COURT:** So then just do that. And if you
25 prefer -- I would do it earlier rather than later. You work

1 out the timing. It's up to you. Okay? But you both have the
2 same statements. Okay?

3 But I'm going to be short-tempered -- I'm just telling you
4 now -- if someone gets up and says, *This is the wrong*
5 *translation*. I don't want to burn jury time on that. This is
6 easy. French to English is a snap. Okay? So just get it
7 done. This is not a complicated, you know, East Asian
8 language, and it has difficulties. I've had that situation.
9 This is not it. Okay?

10 **MR. MIRENDA:** Thank you, Your Honor.

11 **MR. MYRE:** Understood, Your Honor.

12 **THE COURT:** Anything else I can help you with?

13 Okay. I will see you on April 10th.

14 (At 11:53 a.m. the proceedings were adjourned.)

15 I certify that the foregoing is a correct transcript from the
16 record of proceedings in the above-entitled matter.

17
18 

19 March 24, 2017

20 Signature of Court Reporter/Transcriber Date

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Lydia Zinn